

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF OKLAHOMA**

<b>FREDERICK LEE DURBIN,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. CIV 07-262-JHP-KEW</b>
	)	
<b>GREG PROVINCE, Warden,</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER AFFIRMING AND ADOPTING THE REPORT AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE**

On September 2, 2010, the United States Magistrate Judge entered her Report and Recommendation [Docket No. 26] in regard to Petitioner’s Petition for Writ of Habeas Corpus [Docket No. 1]. The Magistrate Judge recommended the petition be dismissed. On October 14, 2010, the Petitioner filed an Objection [Docket No. 31] to the Magistrate Judge’s Report and Recommendation. Five days later, Petitioner filed an Amended Objection to the Report and Recommendation [Docket No. 36], in which he included additional citation to the trial record. *See* Amended Objection to Report and Recommendation at 9-11, Docket No. 36.

In his Objection, Petitioner (1) renewed his argument that the admission of evidence “rendered the trial fundamentally unfair,” (2) argued that he is entitled to an evidentiary hearing under 28 U.S.C. § 2254(e),<sup>1</sup> and (3) stated that the magistrate erred in finding that Petitioner’s trial

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<sup>1</sup>Petitioner cites to 28 U.S.C. § 2254(e)(2) and a collection of cases to support his argument that he is entitled to an evidentiary hearing. *See id.* at 5-6. This Court finds that an evidentiary hearing would be futile; even if Petitioner proved each allegation of error, he would not be entitled to relief, as discussed in the Report and Recommendation. *See generally*, Report and Recommendation, Docket No. 26; *cf.* *Medina v. Barnes*, 71 F.3d 363, 366 (10<sup>th</sup> Cir. 1995) (“To be entitled to an evidentiary hearing in a federal habeas action, the petitioner must first

counsel did not err in not calling certain witnesses to testify. *See generally id.*

The Court has reviewed Petitioner's objections and has determined them to be without merit. Therefore, Petitioner's objections must be overruled. The Court finds that the Report and Recommendation of the Magistrate Judge is fully supported by the record and applicable case law. Therefore, upon full consideration of the entire record and the issues presented herein, this Court finds and orders that the Report and Recommendation entered by the United States Magistrate Judge on September 2, 2010 be **AFFIRMED** and **ADOPTED** by this Court as its Findings and Order. Petitioner's Petition for Writ of Habeas Corpus is therefore **DISMISSED**. Additionally, all motions pending at the time of this order<sup>2</sup> are **DENIED**.

**IT IS SO ORDERED this 23rd day of March, 2011.**

  
James H. Payne  
United States District Judge  
Eastern District of Oklahoma

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make allegations which, if proved, would entitle him to relief.”).

<sup>2</sup>Simultaneously with the filing of Petitioner's Objection to the Report and Recommendation [Docket No. 31], Petitioner moved for (1) introduction of transcripts of the preliminary hearing into the record [Docket No. 33], and (2) expansion of the record to include additional evidence documenting Petitioner's trial counsel's conversation with "Juror No. 5" [Docket No. 34]. Upon consideration of the entire record, this Court finds these motions to be futile and without merit.

On December 21, 2010, Petitioner moved for leave of court to conduct further discovery regarding his claims of ineffective assistance of counsel [Docket No. 37]. After considering the entire record, this Court finds that further discovery would be futile and the motion is without merit.